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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1947

TIMOTEO MARIANO ANDRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINION BELOW

The opinion of the circuit court of appeals (R. 106–113) is reported at 163 F. 2d 468.

JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1947 (R. 114), and a petition for rehearing was denied October 8, 1947 (R. 115). The petition for a writ of certiorari was filed November 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the jury were correctly instructed in respect of their right to qualify a verdict of guilty of murder in the first degree by adding the words "without capital punishment."

2. Whether the jury were correctly charged in respect of the requirement that their verdict must be unanimous.

3. Whether the jury were sufficiently instructed that they should not consider the fact that an indictment had been returned as evidence of guilt.

4. Whether the district court had power, under Section 323 of the Criminal Code, as amended, to sentence petitioner to death by hanging.

STATUTES INVOLVED

Section 275 of the Criminal Code (18 U. S. C. 454) provides in pertinent part:

> Every person guilty of murder in the first degree shall suffer death. * * *

Section 323 of the Criminal Code, as amended by the Act of June 19, 1937, c. 367, 50 Stat. 304 (18 U. S. C. 542), provides:

> The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available State or local facilities and the services of an appropriate State or local official or employ some other

person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof.

Section 330 of the Criminal Code (18 U. S. C. 567) provides:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

Section 10851 of the Revised Laws of Hawaii (1945) provides in pertinent part:

> The warden of Oahu prison or some one deputed by him shall inflict the punishment of death, by hanging the criminal by the neck until dead * * *.[1]

STATEMENT

On December 17, 1943, petitioner was indicted in the District Court of the United States for

[1] The corresponding section (5544) of the 1935 edition of the Revised Laws, which was in effect on March 31, 1944, the date of the imposition of the death sentence involved herein (R. 54–55), was identically worded.

the Territory of Hawaii for the first-degree murder, by stabbing, of a woman named Carmen Saguid in Civilian Housing Area No. 3 at Pearl Harbor (R. 2, 5). At petitioner's trial, 22 witnesses testified for the Government and numerous exhibits were received (R. 43–49).[2] No evidence was presented by the defense (R. 49).

In his charge to the jury (R. 6–26), the trial judge gave, among others, the following instruction (R. 24):

> I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

This was immediately followed by the following instruction, requested by petitioner (*ibid.*):

> I instruct you, gentlemen of the jury that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto "without capital punishment" in which case the defendant shall not suffer the death penalty.
>
> In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment,"

[2] The testimony is not contained in the record.

> and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.

After the jury had retired to consider their verdict, they returned to the courtroom, and the foreman asked (R. 99):

> The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging, or use his own discretion.

The trial judge replied (R. 100):

> * * * The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death. As I told you in your instructions, there is another Federal statute which enables you gentlemen to qualify your verdict and to add, in the event you should find the person guilty of murder in the first degree, to add to that verdict, I repeat, the phrase "without capital punishment." In that event the man, of course, under the statute so convicted would not suffer the punishment of death but it would [be] life imprisonment, * * *.

He then reread to the jury the foregoing instructions (R. 100–101).

The jury again retired and later returned an unqualified verdict of guilty of murder in the first degree (R. 51). Petitioner, accordingly, was sentenced to death by hanging (R. 55). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 114).

Other pertinent instructions involved herein will be referred to in the Argument, *infra*.

ARGUMENT

1. In *Winston* v. *United States*, 172 U. S. 303, the question presented was the proper construction of Section 1 of the Act of January 15, 1897, c. 29, 29 Stat. 487, the predecessor of Section 330 of the Criminal Code (*supra*, p. 3), the wording of which, in pertinent part, is identical with that of the earlier statute. The trial court in the *Winston* case had instructed the jury that they should not qualify a verdict of guilty by the words "without capital punishment" unless in the judgment of the jury there existed "palliating circumstances which would seem to justify and require it" (172 U. S., at 306). This Court held that such an instruction was erroneous, saying (172 U. S., at 312–313):

> The right to qualify a verdict of guilty, by adding the words "without capital punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exer-

cise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury and of the jury alone.

(a) Petitioner contends that the trial court's instructions in the present case in respect of the jury's right to qualify their verdict (*supra*, pp. 4–5) were erroneous because, he says, "the *Winston* case invites, if it does not command, trial courts to instruct juries that their discretion in the matter of qualifying their verdicts is not limited to cases in which there are palliating circumstances" (Pet. 9). The record shows, how-

ever, that the jury were expressly so told. In petitioner's own requested instruction (*supra*, pp. 4–5), the jury were told that they had the privilege of qualifying their verdict "no matter what the evidence may be and without regard to the existence of mitigating circumstances." The record thus negates the very assumption on which this contention is based.

(b) Petitioner further contends that the instructions respecting the right to return a qualified verdict were deficient in that the considerations mentioned in the above-quoted passage from the *Winston* opinion as being possible legitimate reasons which might induce a jury to qualify their verdict ("age, sex, ignorance," etc.) were not expressly pointed out to the jury (Pet. 9). The contention is clearly without merit. This Court held in the *Winston* case that the question of whether a verdict of guilty should be qualified must be left by the trial judge to the absolute and unfettered discretion of the jury. This the trial judge did in the instant case. The *Winston* opinion does not suggest that the various "considerations" mentioned therein must be specifically called to the jury's attention. It merely refers, by way of example, to some of the considerations which might appeal to a jury as reasons for adding the qualification. There plainly is no intimation in the opinion, as the court below points out (R. 108–109), that the trial judge's charge must specifically list such considerations.

(c) A further related contention advanced by petitioner is that the trial judge affirmatively invaded the jury's discretion to qualify their verdict for any reason whatsoever that appealed to them by instructing them "to eliminate sympathy and to confine [themselves] to the evidence and to the issues" (Pet. 10). In support of this contention he quotes several instructions to the effect that the jury must not permit sympathy, passion, or prejudice to affect their judgment, but must confine themselves to the evidence and the issues (Pet. 2–3). These admonitions, however, were given early in the charge (R. 7–8), when the judge was instructing the jury as to what they should and what they should not consider in deciding the primary question of the guilt or innocence of petitioner. The matter of the jury's right to qualify a verdict of guilty by adding the words "without capital punishment" was not reached until much later in the instructions (R. 24), and the later instructions were not only appropriately devoid of any admonition not to be influenced by sympathy or compassion, but, as we have shown, contained a positive instruction that the right to add the qualifying words might be exercised "no matter what the evidence may be and without regard to the existence of mitigating circumstances" (R. 24). As the circuit court of appeals pointed out in answering the present contention (R. 109):

> * * * The admonition [not to be influenced by sympathy or compassion] was given in what may be termed the prologue to the instructions. This introductory matter dealt in general terms with the differing functions of the judge, counsel and the jury in the trial of the case. A study of these introductory remarks persuades us that the instruction complained of could hardly have been understood otherwise than as having reference to the duty of the jury in arriving at their decision on the primary question before them, namely, whether the accused was guilty of the crime charged. It was not until much later in the charge that the court commented on the power to qualify the verdict, and its comments on the subject could leave the jury in no doubt that relief from the death penalty was a matter committed without limitation to their discretion.

That the jury could not possibly have been misled into thinking they must eliminate considerations of sympathy or compassion in determining whether to qualify their verdict is confirmed, moreover, by the incident of the jury's return to the courtroom, after having retired to consider their verdict, to inquire whether, in the event they returned an unqualified verdict of guilty, it would be mandatory on the judge to sentence the accused to death, or whether the judge might use his own discretion. The reply was that unless the verdict was qualified the death sentence was man-

datory. The judge then read to the jury once more his instructions concerning their power to qualify their verdict, thus, as the court below observes (R. 110), "stressing at a crucial moment the unfettered nature of the right."

2. Petitioner further contends that the trial judge's instruction (R. 25) that in order for the jury to return a qualified verdict of murder in the first degree their decision to do so must be unanimous "was the equivalent of telling them that if they were unanimous in agreeing that petitioner was guilty of murder in the first degree but could not agree as to the qualification they were nevertheless to return a verdict of murder in the first degree without qualification" (Pet. 10). The circuit court of appeals said in its opinion (R. 110) that this instruction presented "the one difficult problem in the case." The court reaffirmed its earlier holding (*Smith* v. *United States,* 47 F. 2d 518) that the jury's decision not to qualify a first-degree murder verdict by adding "without capital punishment" must be no less unanimous than its decision so to qualify such a verdict. The earlier decision, the court said (R. 111–112), "is not only the humane construction of the statute; it appeals to us as an interpretation more in harmony [than the interpretation of the dissenting opinion in the *Smith* case] with the traditional spirit of the jury system, and with the legislative purpose as well." Accordingly, the court observed (R. 112), "It follows that the in-

struction given here, while correct so far as it went, did not completely expound the applicable law. A full exposition would have included the charge that before the jury may return a verdict of first degree murder without qualification, their decision to do so must in like manner be unanimous." Nevertheless, the court below concluded that the failure to instruct the jury thus expressly would not justify a reversal. The court observed that "Jurors ordinarily understand, without being told, that they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part; and unless they are instructed to the contrary, as they were in *Smith* v. *United States*, supra, they may be relied upon to adhere to the common understanding of their ancient prerogative" (R. 112). The court further observed that "following immediately upon the giving of the instruction in question was a flat charge that 'the unanimous agreement of the jury is necessary to a verdict,' and that 'while a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the evidence justifies him in voting' " (R. 112–113; see R. 25). Accordingly, the court decided, "Although this admonition was couched in general terms, we are satisfied that it served to dispel any uncertainty that the immediately preceding charge might have engendered" (R. 113).

The conclusion of the circuit court of appeals that the jury understood that their decision not

to qualify their verdict must, like their decision to add the qualifying words, be unanimous is supported, too, by the fact that they were told they might find any one of four verdicts—guilty of murder in the first degree, guilty of murder in the first degree without capital punishment, guilty of murder in the second degree, and not guilty (R. 26). The general instruction that the verdict must be unanimous applied to each of the four possible verdicts, and, as we have shown, the jury were fully aware that their return of the first verdict meant that the death sentence would be mandatory.

Moreover, after the trial judge explained to the jury, in reply to their mid-deliberation query, that the death sentence would be mandatory unless they qualified their verdict of guilty of first-degree murder, he repeated to them, as we have already mentioned, his instructions dealing with the discretionary power they possessed. He also repeated to them his instruction that a qualified verdict would have to be unanimous, in these words (R. 101):

> And, finally, you will recall I said that you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, *like your regular verdict,* be unanimous. [Italics supplied.]

The "regular verdict" thus mentioned must have had reference to a verdict of guilty of first-degree murder—i. e., without the qualifying language. Since the jury had been told that this verdict would make imposition of the death penalty mandatory, they must have understood from the judge's instruction that an unqualified verdict—in effect, a sentence to death—would, like a qualified verdict, have to be unanimous.

3. Petitioner further contends that his trial was unfair because the jury were told that "the indictment against him reflected a finding by the grand jury that he was probably guilty of the crime of murder in the first degree" (Pet. 11). When the instructions complained of (see Pet. 3) are read in the context in which they were given, however, it plainly appears that no prejudicial inference could have been drawn or intended to be drawn. The challenged instructions occurred in the following passage from the main charge to the jury (R. 9–10):

> To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any

time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. The presumption of innocence in favor of the defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. The presumption of innocence continues with the defendant throughout the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

When the indictment was returned by the grand jury against this defendant, the defendant had had no opportunity to present his side of the case. The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.

Upon the evidence [which] it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.

I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case.

No exception was taken to this instruction.

Numerous times thereafter in the course of the charge, moreover, the trial judge repeated and reemphasized to the jury that the fact of the indictment's return must not be considered by them in the slightest degree as evidence of the truth of the charge contained in it. Thus, he charged them that "the indictment in this case contains merely the formal statement of the charge against the defendant and is not to be taken as any evidence of defendant's guilt" (R. 19); that "The indictment in this case is in no sense evidence or proof that the defendant has committed the alleged crime. It is merely a formal allegation, required by law, alleging that the crime was committed in the form and manner therein set forth. No juror should suffer himself to be influenced in any degree whatsoever by the fact that this indictment has been returned against the defendant" (R. 19–20); that "The presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and binding upon you and it is your duty to give the defendant the full benefit of this presumption of innocence and to find him not guilty unless the evidence satisfies you of his [guilt] beyond all reasonable doubt" (R. 20). He further charged that "This [the rule of presumption of innocence] is not a mere technical rule to be lightly considered by you, but is a humane provision of the law to which you must give due re-

gard, and if the evidence leaves a reasonable doubt in your mind as to the [guilt] of the defendant or as to any material allegation of the indictment you are bound by the provisions of law and by your oaths, to find the defendant not guilty" (R. 21); that "in a criminal case, the burden of proof * * * never shifts to the defendant, but remains upon the United States of America throughout the case to prove the guilt of the defendant beyond all reasonable doubt. This burden does not, under any circumstance, shift to the defendant to prove his innocence" (R. 21); and that "it is in nowise incumbent upon the defendant to explain away the evidence offered by any of the witnesses on behalf of the government, nor to produce * * * any evidence to explain why he has been accused of the crime described in the indictment" (R. 22).

Plainly, therefore, as the court below observed (R. 113), "the court fully developed the proposition that the indictment was not to be taken in any sense as evidence of guilt, but was a mere accusation serving the formal purpose of framing the issues. The instructions on this matter tended, as they were designed to do, to protect the cause of the accused."[3]

[3] The cases cited by petitioner (Pet. 11) as supporting an alleged conflict of decisions among circuits merely announce the well-settled rule that it is error to refuse to give a requested charge that the indictment is merely a formal accusation and is not to be considered as evidence of guilt. But

4. Finally, petitioner contends that the district court had no power to sentence him to be hanged (Pet. 12–13). The district court's sentence directed that petitioner be put to death by hanging, this being the manner of executing death sentences provided by statute in the Territory of Hawaii (*supra*, p. 3). Petitioner's argument is that Section 323 of the Criminal Code, as amended (*supra*, pp. 2–3), provides that "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed," but does not expressly provide for the manner of inflicting the death penalty in cases where the sentence is imposed by a federal district court sitting in a Territory. The contention is without merit.

Prior to its amendment in 1937, Section 323 provided that "The manner of inflicting the punishment of death shall be by hanging" (35 Stat. 1151). By the Act of June 19, 1937, c. 367, 50 Stat. 304, the section was amended to read in its present form. The purpose of the amendment is stated in H. Rep. No. 164, accompanying H. R. 2705, 75th Cong., 1st Sess., the bill which subsequently became the amending Act of June 19, 1937. It is there pointed out that whereas the

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since this instruction was given in the instant case, as we have shown, not once but many times, there is obviously no conflict as claimed.

method of inflicting death sentences imposed by federal courts had been, since the beginning of the Government, by hanging, many states were then using other methods of execution, such as electrocution or gas. It was thought advisable, therefore, to change the federal law so as to make the federal mode of executing death sentences the same as that employed in the state within which the federal sentence was imposed. While neither the committee report nor the bill itself expressly referred to Territories, it is obvious that no intent to exclude Territories from the operation of the law can be inferred from the mere fact that "States" was the word employed. The manifest intent of Congress was to make the federal manner of inflicting death conform to the manner followed in the jurisdiction in which the federal court was located. Otherwise, it would be necessary to impute to Congress the absurd intent of providing that death should be decreed for persons found unqualifiedly guilty of murder in the first degree in federal courts situated in Territories, without providing any method of executing such death sentences. But it is well settled that not even a penal statute may be so strictly or technically construed as to defeat a manifest congressional intent. Cf. *United States* v. *Gaskin,* 320 U. S. 527, 529–530; *United States* v. *Raynor,* 302 U. S. 540, 552; *United States* v. *Giles,* 300 U. S. 41, 48; *Gooch* v. *United States,* 297 U. S.

124, 128; *United States* v. *Corbett,* 215 U. S. 233, 242. Consequently, petitioner's contention is untenable. See *Talbott* v. *Silver Bow County,* 139 U. S. 438, 441–446.[4]

CONCLUSION

The judgment below is correct and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

DECEMBER 1947.

[4] In the *Talbott* case, this Court said (p. 444):

"* * * while the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this court."

U. S. GOVERNMENT PRINTING OFFICE: 1947